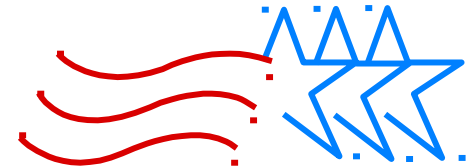




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# Personal vs Non-Personal Services Contracts



# Agenda

- Definition of a Personal Services Contract
- Federal Government Policy and Regulatory Guidance
- TRICARE Management Activity (TMA) Responsibilities
- Guiding Principles
- How to Recognize an Unlawful Personal Services Contract
- Methods of Reporting
- Impact & Consequences
- Questions & Answers



# Personal Services Contracts

## Definition

A Personal Services Contract is a contract that, by its express terms or as administered, makes the contractor personnel appear, in effect, Government employees. i.e., contractor personnel are subject to the relatively continuous supervision of a Government official.

The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws unless Congress has specifically authorized acquisition of the services by contract. Obtaining personal services by contract, rather than by direct hire, circumvents civil service laws unless specifically authorized by Congress.

Depending on how a contract is administered and how contract personnel are used, the Government-Contractor relationship may evolve into an unlawful personal services arrangement.



# Statutory and Regulatory Framework

- Federal Acquisition Regulation (FAR)
- DoD Supplement to the FAR
- Office of Federal Procurement Policy (OFPP) policy letter 92-1, dated Sep 23, 1992
- 5 U.S.C. Section 3109
- 10 U.S.C. Section 1091



# Contractor Ethics Regulations

- Certain Conflict of Interest (COI) laws (e.g. bribery)
- False Claims Act, and other false statement/false claims laws
- Procurement Integrity Act
- Federal Acquisition Regulation (FAR)
  - (3.104) Procurement integrity
  - (3.2) Contractor gratuities to government personnel
  - (9.1) Responsible contractors
  - (9.4) Debarment/Suspension
  - (9.5) Organizational and Consultant COI
  - (37.104) Personal Services Contracts



# Regulatory Requirements

Personal Service Contracts for expert and consultant services must be authorized by a determination and findings (D&F), with a determination that:

- The duties are of a temporary or intermittent nature.
- Acquisition of the services is advantageous to the national defense.
- DoD personnel with necessary skills are not available.
- Excepted appointment cannot be obtained.
- A non-personal services contract is not practicable.
- Statutory authority and other legislation applies when contracting experts and consultants (5 U.S.C. 3109).
- Any other determination required by statutes has been made.



# Regulatory Requirements

- Personal Service Contracts for expert or consultant services shall not exceed one year.
- Payment to each expert or consultant for personal services shall not exceed the highest rate fixed for grade GS-15.
- Special Personal Services Contracts for health care providers are authorized by 10 U.S.C. 1091:
  - Can be paid no more than the President of the United States
  - Guidelines are in DoD Instruction 6025.5, Personal Services Contracts for Health Care Providers



# Regulatory Requirements

Under Non-Personal Services Contracts, contractor personnel cannot:

- Be placed in a position where they are under the relatively continuous supervision and control of a government employee.
  - However, merely requiring a specific performance or result, with the right to accept or reject the work, is not that type of supervision
- Be placed in a position of command, supervision, administration, or control over government personnel, or over personnel of other contractors; or become part of the government organization.





# TMA Personnel Responsibilities

- TMA is not authorized to enter into Personal Service Contracts for “other than purchased-care” contracts.
- TMA personnel are responsible for ensuring that Government-Contractor relationships do not evolve into unlawful personal services arrangements.
- TMA personnel are responsible for reporting and stopping an unlawful personal services arrangement.



# Guiding Principles for TMA

TMA personnel should:

- Ensure contractors are complying with all Government policies, as well as the terms and conditions of the contract.
- Implement management control measures to the terms of the contract.
- Play an active, attentive role during contract administration.
- Be aware of the Government's degree of reliance on service Contractors. The greater the degree of reliance on contractors the greater the need for oversight by agencies.
- Ensure contractors are always clearly identified as contractors.
- Exercise independent judgment and critically examine all contractor advice, opinions, recommendations, ideas, reports, analyses, and other work products.
- Protect classified, proprietary, and sensitive information by ensuring proper procedures are followed for distribution and storage.



# Guiding Principles for TMA

The following situations should be avoided:

- Contractor employees working on a schedule controlled by Government official instead of the contract or the contractor's Task Manager.
  - This does not eliminate the contractor's requirement to adhere to a duty schedule stipulated in the contract.
- Leave and other time off directly controlled by the Government official instead of the contractor's Task Manager.
- Holidays and other time off is being governed by the Government official, not the contract or the contractor's Task Manager.
- Implying or specifying who a contractor should hire.



# Recognizing Unlawful Personal Service Contracts

- In determining whether an employer-employee relationship exists, the key question will always be:

“Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract?”
- FAR 37.104(d) provides the following additional guidance:
  - Is performance on site? (i.e., on a Government Installation)
  - Are the principal tools and equipment furnished by the government?
  - Are the services being performed by the contractor directly related to the accomplishment of the agencies assigned mission or function?
  - Are comparable services being performed in the same agency by civil service personnel?
  - Will the need for this type service be expected to last beyond 1 year?
  - Does the nature of the service being provided reasonably require Government direction or supervision of contractor employees in order to adequately protect the Government’s interest, retain control of the function involved, or retain personal responsibility for the function by a duly authorized Federal officer or employee?



# Recognizing Unlawful Personal Service Contracts

For services contracts with some of these elements, the Government should:

- Proceed with caution.
- Re-evaluate the SOW to ensure that Government personnel will not be directing or supervising contractors to accomplish the contract performance requirements.
- Use extreme care in the manner in which the contract is administered.

It is TMA policy to avoid the appearance of any personal services. A Contractor's Task Manager must be identified on every TMA contract.



# Methods of Reporting

- If an individual has concerns about potential personal services being performed by a TMA contractor, the employee should promptly:
  - Notify the responsible Office/Program Manager.
  - Notify the responsible Contracting Officer's Representative.
- Once a TMA Office/Program Manager becomes aware of potential personal services being performed by a contractor within their office, the manager should:
  - Notify the responsible Contracting Officer's Representative and,
  - Each should seek guidance from the responsible Contracting Officer as appropriate



# Impact and Consequences

The impact and consequences of an unlawful personal services contract can vary with the circumstances and facts of each situation, but may include:

- Violation of the Antideficiency Act
  - ADA violations include “Accepting voluntary services for the United States, or employing personal services not authorized by law, except in cases of emergency involving the safety of human life or the protection of property.” 31 U.S.C. § 1342.
- Agency / IG investigation
- Administrative or disciplinary action



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# Questions & Answers



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